Supreme Court, U.S.
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No. 10-640

IN THE
Supreme Court of the United States

EDUARD SHLAHTICHMAN,
Petitioner,

v.

1-800 CONTACTS, INC.,
Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether certiorari should be granted to review the Seventh Circuit's ruling that the provisions of the Fair and Accurate Credit Transactions Act of 2003, 15 U.S.C. § 1681c(g), that prohibit the "printing" of more than the last five digits of a credit card number or the card's expiration date on electronic receipts provided at "the point of the sale or transaction," do not apply to confirmations of internet transactions sent by e-mail from online retailers to customers.

RULE 29.6 STATEMENT

Respondent 1-800 CONTACTS, Inc. has no parent corporations, and no publicly held company owns ten percent or more of its stock.

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RESPONDENT'S BRIEF IN OPPOSITION

In affirming the district court's order granting Respondent's motion to dismiss, the United States Court of Appeals for the Seventh Circuit became the first appellate court to consider whether e-mail confirmations of internet transactions are printed "receipts" governed by the receipt truncation provisions of the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), 15 U.S.C. § 1681c(g). The Seventh Circuit's reasoned and well-supported decision, like the district court's opinion, adopted the interpretation that has been applied by a clear and growing majority of district courts. The

Seventh Circuit ruled that e-mail confirmations are not printed receipts provided at the point of sale, and thus are not regulated by FACTA.

There is no circuit split on this issue (nor is there likely to be one), and the Seventh Circuit's decision was correct, involving the straightforward application of a plainly-worded statute. Moreover, the only argument Petitioner advances before this Court -- that a failure to reverse the Seventh Circuit will result in state courts being buried beneath an avalanche of litigation based on a "[c]haotic [h]odgepodge of [s]tate [l]aw" (Pet. for a Writ of Cert. ("Pet.") at 5) -- is purely hypothetical. There has been no flood of state court litigation in states where district courts have rejected Petitioner's construction of FACTA. Furthermore, Petitioner did not raise his argument in the district court, and has thus waived it. Petitioner has failed to raise a single creditable reason for this Court to review this case, and the petition should be denied.

JURISDICTION

This Court has jurisdiction to review the petition under 28 U.S.C. § 2101(c) and Supreme Court Rule 13, because the petition was filed within ninety days after the entry of the judgment of the United States Circuit Court of Appeals for the Seventh Circuit.

STATUTORY PROVISIONS INVOLVED

The only statutory provisions implicated by the petition are: 15 U.S.C. § 1681c(g), requiring the truncation of credit card numbers and expiration dates from electronically printed receipts provided to customers at the point of a sale or transaction; and 15 U.S.C. § 1681(n), providing for statutory damages in the case of willful violations of the Fair Credit Reporting Act ("FCRA"), including Section 1681c(g).

STATEMENT OF THE CASE

This dispute arises from the transmission of an e-mail confirmation of an online transaction. That e-mail confirmation, sent from Respondent 1-800 CONTACTS to Petitioner Edward Shlahtichman, included the expiration date of Petitioner's credit card. Petitioner's complaint asserted that the e-mail confirmation was a "computer-generated receipt" upon which Respondent had "electronically printed" the expiration date from Petitioner's credit card, in allegedly willful violation of FACTA's receipt truncation provisions.

The instant petition seeks to challenge the Seventh Circuit's decision affirming the district court by concluding that the statutory term "electronically printed" does not encompass e-mail confirmations (Pet. App. at 10a) and that FACTA's use of the phrase "at the point of the sale or transaction" indicates that Congress intended to regulate only face-to-face transactions taking place in brick-and-

mortar store locations. (*Id.* at 10a-13a.) The Seventh Circuit further held that, even if it had construed FACTA too narrowly, dismissal nevertheless would be required because 1-800 CONTACTS' plausible construction of FACTA cannot have amounted to a willful violation of FCRA, according to the framework established by this Court in *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47, 69-70 & n. 20 (2007). (Pet. App. at 17a-18a.)

1. Background Facts.

Respondent 1-800 CONTACTS is a Utah-based corporation engaged in the business of selling contact lenses and related items over the internet. (Doc. 1-1 p. 6 ¶ 16.)[1] Petitioner Shlahtichman placed an internet order with 1-800 CONTACTS on June 2, 2009. (*Id.* ¶ 18.) On that same day, 1-800 CONTACTS sent Shlahtichman an e-mail confirmation of the transaction. (*Id.*) The e-mail confirmation displayed the expiration date of the credit card Petitioner had used to make the purchase. (*Id.*) Petitioner filed suit under FACTA, alleging that inclusion of the card's expiration date on the e-mail confirmation violated FACTA's receipt truncation requirements. (*Id.* ¶ 28.) Petitioner did not claim any actual damages, but alleged that Respondent's conduct constituted a "willful" violation of FACTA, entitling him to statutory damages under 15 U.S.C. § 1681(n). (*Id.* ¶ 10.)

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[1] Citations to "Doc. ___" refer to items in the electronic record Petitioner filed with the Seventh Circuit.

2. Proceedings Below.

In the district court, Respondent moved to dismiss under Fed. R. Civ. P. 12(b)(6). Respondent argued that, under the plain meaning of FACTA, the e-mail confirmation provided to Petitioner was neither an "electronically printed" receipt nor a receipt provided at the "point of the sale." Respondent also argued that, even if its interpretation was rejected, that interpretation was sufficiently plausible to make it impossible for any violation to have been willful. (Doc. 17.) In response, Petitioner did not make any policy-based arguments, and nowhere discussed federal law preemption of state law receipt truncation standards. Rather, Petitioner simply argued that the statutory language is broad enough to encompass e-mail confirmations sent to purchasers over the internet, and that willfulness is a fact question unable to be resolved on a motion to dismiss. (Doc. 21.) The district court granted Respondent's motion to dismiss, accepting its arguments as to the interpretation of FACTA but not reaching the willfulness issue. (Pet. App. at 24a-31a.)

The Seventh Circuit, in a unanimous opinion by Judge Rovner, affirmed the district court's decision. The Seventh Circuit agreed that FACTA does not apply to e-mail confirmations because they are not "printed" (*Id.* at 81-10a), and because such electronic confirmations are not provided "at the point of the sale or transaction." (*Id.* at 10a-13a.) Unlike the district court, however, the Seventh Circuit also addressed the willfulness issue, adding

that any violation could not possibly have been willful because Respondent's interpretation of the statute was reasonable. (Pet. App. at 17a-18a.) In briefing on appeal, Petitioner argued for the first time that FCRA's "preemption provisions" compel a conclusion that FACTA's truncation requirements apply to e-mail transactions, so as to prevent application of inconsistent state laws. The Seventh Circuit rejected that argument, noting that "Shlahtichman forfeited this argument by failing to make it in the district court." (*Id.* at 17a.) This preemption-based argument is the only argument Petitioner raises in his petition to this Court.

REASONS FOR DENYING THE PETITION

Shlahtichman's petition meets none of the three conditions laid out in this Court's Rule 10, "Conditions Governing Review on Writ of Certiorari." This is an appeal of a decision of a federal court of appeals, where no contrary decision from another court of appeals or a state court of last resort exists. Petitioner has not claimed (and cannot reasonably claim) that the Seventh Circuit "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

Under these circumstances, the only plausible justification for review by this Court is a finding that the Seventh Circuit "has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

Shlahtichman's petition falls well short of establishing that such an important question exists. Section 1681c(g) of FACTA establishes straightforward statutory requirements, and the district and circuit courts correctly interpreted those requirements. Moreover, the only ground on which Petitioner bases his request for review -- a fear that the Seventh Circuit's ruling will lead to an avalanche of inconsistent state litigation -- is hypothetical and unfounded, and has not been preserved. For these reasons, the petition should be denied.

I. There Is No Circuit Split On This Issue.

As the petition correctly notes (*see* Pet. at 10), the Seventh Circuit's decision below was the first decision by a federal court of appeals to consider the FACTA truncation requirements' applicability to e-mail confirmations of internet transactions. The case thus involves the construction and application of a federal statute. If the federal courts of appeal were construing this statute differently, providing conflicting guidance to district courts and litigants, there might be a compelling reason for this Court to review the issue. *See* Sup. Ct. R. 10(a). That is not the case here.

Moreover, such a circuit split is unlikely ever to arise over the construction of FACTA. Although a minority of district court judges have held that FACTA's truncation requirements may apply to

internet transactions,[2] a clear majority of cases to consider the question have rejected that interpretation and reached the same result as the Seventh Circuit. These courts have ruled that the plain meanings of "print" and "point of sale" demonstrate that Congress did not intend for FACTA's truncation requirements to apply to e-mail confirmations.[3] In addition, federal courts are becoming increasingly uniform in their rejection of Petitioner's construction. As reflected in footnotes 1 and 2, Respondent is aware of only one district court case since March 2008 to have accepted Petitioner's position, while in that same time period, at least ten district court judges have adopted the interpretation accepted by the Seventh Circuit. The clear trend

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[2] *See Romano v. Active Network Inc.*, No. 09 C 1905, 2009 WL 2916838 (N.D. Ill. Sept. 3, 2009); *Harris v. Best Buy Co., Inc.*, 254 F.R.D. 82 (N.D. Ill. Mar. 20, 2008); *Grabein v. 1-800-Flowers.com, Inc.*, No. 07-22235-CIV, 2008 WL 343179 (S.D. Fla. Jan 29, 2008); *Vasquez-Torres v. Stubhub, Inc.*, No. CV 07-1328, 2007 U.S. Dist. LEXIS 63719 (C.D. Cal. July 2, 2007).

[3] *See Simonoff v. Kaplan, Inc.*, No. 10 Civ. 2923, 2010 WL 4823597 (S.D.N.Y. Nov. 29, 2010); *Holt v. LivInn Suites, Inc.*, No. 10-383, slip op. (D. Minn. May 21, 2010); *Holzman v. Shoes.com, Inc.*, No. 10-cv-1145, slip op. (N.D. Ill. Apr. 6, 2010); *Turner v. Ticket Animal, LLC*, No. 08-61038-CIV, 2009 WL 1035241 (S.D. Fla. Apr. 16, 2009); *Smith v. Zazzle.com, Inc.*, 589 F. Supp. 2d 1345 (S.D. Fla. 2008); *Smith v. Under Armour, Inc.*, 593 F. Supp. 2d 1281 (S.D. Fla. 2008); *Grabein v. Jupiterimages Corp.*, No. 07-22288-CIV, 2008 WL 2704451 (S.D. Fla. Jul. 7, 2008); *King v. Movietickets.com, Inc.*, 555 F. Supp. 2d 1339 (S.D. Fla. 2008); *Haslam v. Federated Dept. Stores, Inc.*, No. 07-61871 CIV, 2008 WL 5574762 (S.D. Fla. May 16, 2008); *Narson v. GoDaddy.com, Inc.*, No. CV-08-0177, 2008 WL 2790211 (D. Ariz. May 5, 2008).

among district courts is to apply the common-sense, plain meanings of "print" and "point of sale" that were applied by both courts below. It is unlikely that there will *ever* be a circuit conflict surrounding Section 1681c(g), and no such controversy exists at this time.

II. By Its Plain Terms, Section 1681c(g) Does Not Apply To E-Mail Confirmations Of Internet Transactions.

This Court also should deny the petition because the district and circuit courts' interpretation of the relevant statutory provisions was correct. Section 1681c(g) is a clear statute that employs common words with accepted, well-understood meanings. If a court applies the plain meaning of FACTA's statutory language, the only plausible conclusion is that Congress did not intend FACTA to extend to e-mail confirmations of internet transactions.

When construing a statute, "the beginning point must be the language of the statute." *Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). If the statute does not expressly define a word or term, courts presume that Congress intended the word's ordinary meaning. *Williams v. Taylor*, 529 U.S. 420, 431 (2000). Courts must consider the ordinary meaning of words "in the context of the statutory scheme in which they appear." *Pace v. DiGuglielmo*, 544 U.S. 408, 420 (2005).

Application of these principles to FACTA's receipt truncation provisions supports the interpretation adopted by the district court and the Seventh Circuit in this matter. First, the statute applies only to receipts that are "printed," and uses a variation of the word "print" four times in Section 1681c(g)'s three subsections. 15 U.S.C. § 1681c(g). The plain and ordinary meaning of the word "print" is to transfer images or information to paper or some other tangible medium. Every dictionary Respondent could locate includes some derivation of this basic description as a primary definition of the term "print."[4] Had Congress intended FACTA's truncation provisions to apply to "receipts" that were transmitted by e-mail and displayed on a computer screen, but never transferred to paper, Congress would have so stated. Congress would not have presumed that references to "printed" receipts would be construed so as to include e-mails.

Second, the statute applies only to "receipt[s] provided to the cardholder at the point of the sale or transaction." 15 U.S.C. § 1681c(g)(1). The term

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[4] *See, e.g.*, The Cambridge Advanced Learner's Dictionary, *available at* http://dictionary.cambridge.org (search "print," then select "print *verb* TEXT") (last accessed Dec. 5, 2010) (defining "print" as "to produce writing or images on paper or other material with a machine."); Oxford English Dictionary, *available at* http://dictionary.oed.com (search "print," then select "print, *v.*") (last accessed Dec. 5, 2010) (defining "print" as "[t]o make or produce (text, a book, a picture, etc.) by a mechanical process involving the transfer of characters or designs on to paper, vellum, etc., esp. from inked blocks, types, or plates.").

"point of sale" most commonly refers to a physical location.[5] When a customer receives an e-mail confirmation from an internet transaction, the customer does not receive a receipt "at the point of the sale or transaction"; in fact, there *is* no physical point of sale.

The e-mail sent to Petitioner was not "printed" by Respondent, and was not provided to Petitioner at the "point of sale." Accordingly, the decision below was correct, and there simply is not a close question of statutory construction requiring further clarification by this Court. The petition should be denied.

III. Petitioner's Fears That Online Retailers Will Be Subjected To Inconsistent State Laws Are Completely Hypothetical.

The only argument Petitioner advances in support of certiorari is purely hypothetical and does not warrant a review of the Seventh Circuit's decision. Petitioner argues that unless FACTA is construed to apply to e-mail confirmations of internet transactions, online retailers will be subjected to a flood of litigation under varying state laws that establish a host of inconsistent receipt truncation

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[5] *See* The Oxford English Dictionary, *available at* http://dictionary.oed.com (search "point of sale") (last accessed Dec. 5, 2010) (defining "point of sale" as "a place where retail transactions are made, esp. a retail shop; also attrib. (as point-of-sale). Now used esp. of a location at which a retail transaction is recorded electronically.").

requirements. (Pet. at 8.) Petitioner claims this "absurd result" would be at odds with Congress' desire to provide uniform national standards, as reflected in FCRA's preemption provision, 15 U.S.C. § 1681t(b). (Pet. at 8.)

This fear that the Seventh Circuit's ruling will "cause havoc with internet commerce" (Pet. at 2) is purely conjectural. Petitioner simply imagines that retailers will be subject to a maze of inconsistent state statutes. In reality, none of the pre-FACTA state statutes cited by Petitioner expressly apply to e-mailed receipts. In fact, the vast majority of statutes employ language that is very similar to FACTA, expressly prohibiting only "print[ing]" more than the last five digits of the credit card number on "electronically printed" receipts.[6] Not even the post-FACTA statutes expressly apply to online retail transactions. The Illinois statute that Petitioner highlights, for example, is silent as to e-mailed confirmations of sale. 815 Ill. Comp. Stat. 505/2NN (2009).

Further, to date, no court has applied any of the cited state laws to receipts transmitted through e-mail. Indeed, although there is now a growing

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[6] *See* Cal. Civ. Code § 1747.09 (West 2010); Wash. Rev. Code § 19.200.010 (2009); Colo. Rev. Stat. § 6-1-711 (2009); Fla. Stat. § 501.0118 (2009); Nev. Rev. Stat. § 597.945 (2009); Kan. Stat. Ann. § 50-669b (2009); Neb. Rev. Stat. § 28-633 (2009); N.Y. Gen. Bus. Law § 520-a(4-a) (McKinney 2009); Okla. Stat. tit 15, § 752A (2010); N.C. Gen. Stat. § 14-113.24 (2009); Del. Code Ann. tit. 11, § 915A (2009); Ga. Code Ann. § 10-15-3 (2009).

number of cases in which federal courts have dismissed FACTA claims brought by recipients of e-mail confirmations, it does not appear that any of those litigants, barred from federal court, have asserted their claims under state statutes. Petitioner cites no such cases, and Respondent could not locate any. Indeed, the only cases even hinting at the possibility of such state law actions are the instant case and another FACTA lawsuit brought by Petitioner's attorneys. *Holt v. LivInn Suites, Inc.*, No. 10-0383 (D. Minn. May. 21, 2010). In that case, the district court rejected the argument Petitioner now makes that the risk of conflicting state laws warrants a finding that FACTA applies to e-mail transactions. *Id.* at *9. There is no support for Petitioner's hypothetical fear that online retailers will be subject to conflicting state laws, and certainly nothing to warrant a departure from the plain language of the statute.

IV. Petitioner Waived His Arguments By Failing To Present Them Below.

Even if Petitioner's preemption argument had merit, which it does not, Petitioner has waived his right to raise that argument by failing to present it to the district court.

This Court has long stated that it will not address arguments that a party failed to raise below. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 55 n. 4 (2002) ("Brunswick has asserted that federal maritime law governs this case. Because this argument was not raised below, it is waived.");

United States v. Alvarez-Sanchez, 511 U.S. 350, 360 n. 4 (1994) ("Finding no exceptional circumstances that would warrant reviewing a claim that was waived below, we adhere to our general practice and decline to address respondent's Fourth Amendment argument."); *Blair v. Osterlein Mach. Co.*, 275 U.S. 220, 225 (1927) ("This court sits as a court of review. It is only in exceptional cases . . . that questions not pressed or passed upon below are considered here.").

The only argument Petitioner advances before this Court -- that the purpose behind FCRA's preemption provision would best be furthered by applying FACTA's truncation requirements to e-mail receipts -- was not preserved below. (Pet. at 8.) Petitioner never raised that argument before the district court; his only argument there was that the "plain meaning" of "print" includes e-mail transmissions displayed on a customer's computer. *Shlahtichman v. 1-800 Contacts*, No. 09-4032, slip op. (N.D. Ill. Dec. 2, 2009) (Doc. 21 at 1, 4.) Not until his appeal to the Seventh Circuit did Petitioner advance his current preemption argument. Brief of Plaintiff-Appellant Eduard Shlahtichman, *Shlahtichman v. 1-800 Contacts, Inc.*, 615 F.3d 794 (7th Cir. 2010).

In its appellate briefs to the Seventh Circuit, Respondent argued that Petitioner waived his state court preemption argument by not presenting it to the district court. The Seventh Circuit agreed:

> Petitioner makes a belated argument that construing the truncation

> provision not to apply to e-mail receipts is inconsistent with the FCRA's preemption provision . . . [b]ut Petitioner forfeited this argument by failing to make it in the district court, and this is not one of the rare civil cases in which we might overlook the forfeiture.

(Pet. App. at 17a (citations omitted).) Petitioner now ignores the Seventh Circuit's determination, and raises the same preemption argument before this Court without explaining how the Seventh Circuit erred in finding that argument to have been waived. Petitioner waived his preemption argument by failing even to cite FCRA's preemption provision before the district court. Because preemption is the only basis Plaintiff offers for reviewing the Seventh Circuit's decision, this Court should deny the petition.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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